(3)

No. 04-566

Supreme Court, U.S.
FILED
NOV 24 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
EX REL., J. EDWARD WALTERS,

Petitioner,

v.

THE DAUGHTERS OF CHARITY NATIONAL
HEALTH SYSTEM, PROVIDENCE HOSPITAL,
SETON MEDICAL MANAGEMENT, INC.,
AND ASCENSION HEALTH, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PROVIDENCE HOSPITAL'S RESPONSE TO PETITION FOR A WRIT

Attorneys for Providence Hospital

HELMSING, LEACH, HERLONG,
NEWMAN & ROUSE, P.C.
R. ALAN ALEXANDER
FREDERICK G. HELMSING
Post Office Box 2767
Mobile, AL 36652-2767
(251) 432-5521 – voice
(251) 432-0633 – fax

HALL RENDER KILLIAN
HEATH & LYMAN, P.S.C.
DAVID B. HONIG
Counsel of Record
Suite 2000, Box 82064
One American Square
Indianapolis, IN 46282
(317) 633-4884 – voice
(317) 633-4878 – fax

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a factually correct Cost Report constitutes a false claim under the False Claims Act, 31 U.S.C. §3729, *et seq.*, because worksheets not considered in determining future payment rates were appended to the Cost Report?

CORPORATE DISCLOSURE STATEMENT

Daughters of Charity National Health System, Inc. is a Missouri non-profit corporation, with its principal place of business in St. Louis, Missouri. Ascension Health is the sole corporate member of Daughters of Charity National Health System, Inc.

Providence Hospital is an Alabama not-for-profit corporation, with its principal place of business in Mobile, Alabama. Ascension Health is the sole corporate member of Providence Hospital.

Seton Medical Management, Inc. is an Alabama not-for-profit corporation, with its principal place of business in Mobile, Alabama.

Ascension Health is a Missouri non-profit corporation with its principal place of business in St. Louis, Missouri. Ascension Health is the sole corporate member of Daughters of Charity National Health System, Inc. Ascension Health is the sole corporate member of Providence Hospital.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) 5

Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003) 5

Hindo v. University of Health Sciences/The Chicago Medical School, 65 F.3d 608 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114, 116 S.Ct. 915, 113 L.Ed.2d 846 (1996) 6

Kennard v. Comstock Resources, Inc. 363 F.3d 1039 (10th Cir. 2004) 4, 5

Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994), *cert. denied*, 513 U.S. 1154, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995) 6

United States ex rel. Clausen v. Laboratory Corporation of America, 290 F.3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105, 123 S.Ct. 870, 154 L.Ed.2d 774 (2003) 4

United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976) 3

United States v. McNinch, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958) 3

United States v. Neifert-White Co., 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) 3

United States v. Tieger, 234 F.2d 589 (3rd Cir. 1956) 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

False Claims Act, 31 U.S.C. §3729, *et seq.* 1

False Claims Act, 31 U.S. C. §3729(a)(7) 4

False Claims Act, 31 U.S.C. §3730 6

MISCELLANEOUS:

H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986) 6

STATEMENT OF THE CASE

Providence Hospital ("Providence") was a Participating Provider for Medicare and Medicaid services with the United States Health Care Financing Administration ("HCFA") and its successor agency, the Center for Medicare and Medicaid services ("CMS"). In 1997 Providence submitted an Annual Cost Report covering the periods from July 1, 1996, through June 30, 1997. Annual Cost Reports submitted by hospitals are used by the Secretary of Health and Human Services ("Secretary") to determine future payment rates to Participating Providers.

Providence's 1997 Cost Report was filed along with worksheets showing calculations. The Secretary only considered the Cost Report itself, not the worksheets, in setting future payment rates. One of those worksheets, Worksheet A, included sums expended for "Medical Supplies Charged to Patient" and "Drugs Charged to Patients," both under the Worksheet headed "Ancillary Service Cost Centers." However, the Cost Report itself listed the "Ancillary Service Pass Through Costs" as $0.

Petitioner filed his lawsuit pursuant to the False Claims Act ("FCA"), 31 U.S.C. §3729, *et seq.*, alleging, among other things, that the Cost Report constituted a false claim because it might have been used, along with cost reports from all other participating providers throughout the country, to determine future payment rates. The trial court dismissed the claim for failure to state a cause of action. First, the Cost Report itself refuted the allegations, as the costs at issue were not included and therefore no false claims under Petitioner's theory were ever submitted. Second, the alleged overcharges, even had they

been included in the Cost Report, were not claims for payment.

ARGUMENT

Petitioner's request for a writ of certiorari is based on both factual and legal errors. It is further flawed in that it would expand the body of potential *qui tam* relators from whistleblowers with actual knowledge to the entire universe of potential plaintiffs hoping to search for a lawsuit through discovery.

Petitioner's factual basis for the Writ is his allegation that Respondent Hospital misstated costs in its Annual Cost Report, thereby causing inflation in the costs owed by the Secretary of Health and Human Services in determining reimbursement rates. *Petition*, p. 6. This is factually incorrect. As the trial court noted,

> the allegation is contradicted by the Annual Cost Report itself. . . . The trouble with Plaintiff's theory is that the worksheet is not the cost report. Those items – medical supplies and drugs – are listed on the worksheet under the heading 'Ancillary Service Cost Centers,' but those costs are not actually claimed on the Annual Cost Report. The Cost Report lists the 'Ancillary Service Pass Through Costs' filed as $0. Because these overcharges were not actually claimed on the Cost Report, no false claim was submitted.

Pet.Supp.App., p. 12.

There is simply nothing for this Honorable Court to consider, for no inflated costs were submitted. The factual premise of Petitioner's argument is flawed. Absent any

inflation of costs, there was nothing for the Secretary to consider, and there was no claim that could be false.

Petitioner's argument suffers another crucial factual flaw, the absence of a claim for payment. The alleged overstatements found in Providence's worksheets were not claims for payment. Petitioner posits that such calculations could be used by the Secretary in determining future payment schedules. However, as the trial court noted, "[s]ubmitting false data unrelated to a claim for payment is not prohibited by the FCA." *Pet.Supp.App.*, p. 12. The trial court's ruling, and the appellate court's affirmation of same, are consistent with this Honorable Court's pronouncement in *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958), "'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" quoting *United States v. Tieger*, 234 F.2d 589, 591 (3rd Cir. 1956). accord *United States v. Bornstein*, 423 U.S. 303, 309 fn. 4, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976). This Honorable Court has, in one instance, found "claim" as used in the FCA sufficiently expansive to reach loan applications, but even that case was limited to false statements "made with the purpose and effect of inducing the Government immediately to part with money." *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968). In the instant cause Petitioner theorizes only that data from Providence might be a small part of calculations to determine future payments. No immediate parting of money was alleged. The worksheets were not demands for money or property, and they were not prepared to induce the Government to immediately part with money. Even had they been submitted as part of

Providence's Cost Reports, they could not form the basis for FCA liability, as they were not claims.

Petitioner alleged certification was proper to resolve conflict amongst the Circuit Courts of Appeal. There is no such conflict.

The Court below quoted *United States ex rel. Clausen v. Laboratory Corporation of America,* 290 F.3d 1301, 1311 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105, 123 S.Ct. 870, 154 L.Ed.2d 774 (2003), "[w]ithout the presentment of . . . a [false or fraudulent] claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the FCA." *Pet.App.* A-6. Petitioner argued this ruling conflicts with rulings from the Tenth and Fourth Circuits. He is not correct.

Petitioner's claim of conflict relies entirely on the conclusion of the above-quoted sentence rather than the underlying premise. The underlying premise of the sentence is the absence of a claim, not damage to the public fisc. The *Clausen* court concluded 'without a claim, there is no false claim damaging the public fisc.' Petitioner, searching for conflict, misreads the decision to state 'absent damages to the public fisc, there can be no FCA claim' and from this erroneous reading finds conflict.

The Tenth Circuit Court of Appeals' decision in *Kennard v. Comstock Resources, Inc.* 363 F.3d 1039 (10th Cir. 2004), did not address the absence of a claim. The existence of a claim was not disputed. Rather, the *Kennard* court interpreted a section of the False Claims Act, 31 U.S.C. §3729(a)(7), not at issue in the instant cause. That section of the statute provides that "a false record or statement to conceal, avoid, or decrease an obligation to

. . . transfer money . . . to the Government" is actionable. Thus, the Court ruled, while the Government was not the ultimate recipient of the funds and therefore suffered no damages, the false claim made in transferring royalties to the Government for further disbursement to an Indian Tribe was actionable under the FCA. In *Kennard* there was a claim that was false. In the instant cause, there was no such claim. There is no conflict.

Petitioner's analysis of conflict suffers the same deficiencies in discussion of *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), and *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999). Both decisions arose from the same conduct. Just as in *Kennard*, claims containing falsities were submitted, and were actionable, though the Government suffered no quantifiable monetary damages.

In the instant cause, contrary to Petitioner's repeated assertions, no false claims were submitted. The alleged falsities identified by Petitioner were found only in the worksheets. The Annual Cost Report itself, the document Petitioner alleged contained a false claim, did not contain any such falsity. Respondent does not dispute that a false claim may be actionable under the FCA where said falsity is material to the Government's payment decision, even absent damages. However, no actionable cause lies under the FCA, damages or no, absent a claim that is false.

Petitioner, in his conclusion, argued that the *qui tam* provisions of the False Claims Act should not be limited to Relators with insider knowledge. He stated "if the courts are going to allow individuals and corporations to scam the system because False Claims Act plaintiffs have not participated in the fraud and thus, do not have insider

knowledge, as was the situation in this case, the weapon is ineffectual for the great majority of fraud against the Government and taxpayers." Petitioner's theory that plaintiffs lacking insider knowledge should be permitted to come forward as *qui tam* relators, and then search for lawsuits through discovery, is contrary to the purpose of the False Claims Act.

The purpose of the False Claims Act is to encourage "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward," H.R.Rep. No. 660, 99th Cong., 2d Sess. 22 (1986). The whistleblower section of the False Claims Act, 31 U.S.C. §3730, permits only the "insider/'whistleblower'" to maintain a *qui tam* action. *Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 612-613 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114, 116 S.Ct. 915, 113 L.Ed.2d 846 (1996). The whistleblower provision "is intended to encourage those with knowledge of fraud to come forward," *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 513 U.S. 1154, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995), not to encourage plaintiffs to come forward in search of fraud.

The whistleblower provision of the False Claims Act is specifically intended by Congress to encourage insiders with knowledge of fraud to come forward. Petitioner's conclusion that such limitation would render the False Claims Act "ineffectual" merely demonstrates the failure to understand the purpose of the False Claims Act.

CONCLUSION

Petitioner's request for review is based on misstatements of fact, misstatement of law, and failure to understand the basic purpose of the False Claims Act.

This Honorable Court should DENY Petitioner's Request for a Writ of Certiorari.

Respectfully submitted,

R. ALAN ALEXANDER
FREDERICK G. HELMSING
HELMSING, LEACH, HERLONG,
EWMAN & ROUSE, P.C.
Post Office Box 2767
Mobile, Alabama 36652-2767
(251) 432-5521 – voice
(251) 432-0633 – fax

and

DAVID B. HONIG
Counsel of Record
HALL, RENDER, KILLIAN, HEATH
& LYMAN, P.S.C.
Suite 2000, Box 82064
One American Square
Indianapolis, Indiana 46282
(317) 633-4884 – voice
(317) 633-4878 – fax

Attorneys for Respondent